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Recasting *West Tankers* in the deep water: how *Gazprom* and Recast Brussels I reconcile Brussels I with international arbitration

Youseph Farah and Sara Hourani*

Abstract

The central argument which is advanced by this article is that, whilst there is no outright obligation in Brussels I which prevents parallel proceedings between a court action and arbitration between the same parties and concerning a similar cause of action, the revisions in the recast Brussels I, along with the *Gazprom* interpretation of key non-revised parts of Brussels I, do certainly provide improved support for international commercial arbitration. These do so by giving more scope to national courts to restrict Parallel Proceedings; through anti-suit injunctions issued by an arbitral tribunal; through finding parties taking parallel court action to be in breach of the arbitration agreement; and by giving primacy to the arbitral award where it is irreconcilable with a parallel court judgment. The authors particularly demonstrate that this is made possible because of a changed (diminished) role which is given to the principle of effectiveness of EU law (*effet utile*) post *Gazprom* and Brussels I.

Keywords: Brussels I Regulation, Brussels I Recast, Parallel Proceedings, Arbitration, Anti-Suit Injunctions, New York Convention 1958, *Gazprom*, *West Tankers*

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A. Introduction

The (recently revised) recast Brussels I Regulation is concerned with determining which EU Member States' courts have jurisdiction over any given civil or commercial dispute falling within its scope; and also with the recognition and enforcement of judgments made in other Member States.¹ This research is concerned with the impact of the Brussels I regime (and the principle of effectiveness underpinning it) in the context of international arbitration. More particularly, it is concerned with how the Brussels I regime and the associated EU effectiveness principle, affect the rights of courts in one Member State to seek to protect the integrity of international arbitration, by restricting the use of parallel (court) proceedings in the courts of other Member States [hereafter 'parallel proceedings'].

In order to understand the problem of parallel proceedings in an international context, consider the following example: Suppose a party brings proceedings in accordance with an arbitration agreement before an *arbitral tribunal* seated in France. This tribunal determines that the arbitration agreement is valid and therefore exercises jurisdiction over the merits of the dispute.² However, in parallel, the other party to the dispute brings proceedings before an Italian *court*, proceedings which are (allegedly) in breach of an arbitration agreement; yet the Italian court rules that the arbitration agreement is not valid, and asserts jurisdiction on the merits of the claim.³ These parallel (Italian court) proceedings arguably challenge the

¹ The Recast Brussels I Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] OJ L351/1, which supersedes the original Brussels I Council Regulation No 44/2001 (EC) of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L12/1.

² Under the doctrine of competence-competence a tribunal can determine its jurisdiction. See Art 19 of the UNCITRAL Model Law on International Commercial Arbitration (1985).

³ Which is possible under Art II (3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June, 1958 ('New York Convention').

autonomous choices of the parties who originally chose to agree to go exclusively to arbitration, though their occurrence is often the result of one party (disputant) contesting the validity of the agreement of the parties; a right which will be seen is preserved under most national laws and international documents on international commercial arbitration. In addition, considerable costs are generated by having the dispute heard in different *fora*. But now imagine that an English court is faced with two applications; one for the enforcement of the French arbitral award, and the other for the enforcement of the Italian court judgment. The arbitral award and the court judgment are now in conflict with one another. In such circumstances, given the emphasis in Brussels I on respect for court judgments in other Member States, and given the broader EU principle of effectiveness that Brussels I is supposed to support, it is quite possible that the English court will consider it necessary to give precedence to the Italian court judgment over the French arbitral award. Yet this would be in conflict with the national courts' commitment to the enforcement mechanisms of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ⁴[hereafter 'the New York Convention'], and would also make the EU legal order appear to be one that is not friendly to international commercial arbitration.

This article is concerned with how we might resolve these conflicts. So, as indicated in the opening paragraph, it considers the extent to which the Brussels I regime and the associated EU effectiveness principle, really do affect the rights of courts in one Member State to protect the integrity of international arbitration, by restricting the use of parallel proceedings in the courts of other Member States. When the authors speak of 'restricting' the use of parallel proceedings, the most important measures the authors have in mind here are: anti-suit injunctions; upholding a decision of an arbitral body to the effect that the party taking parallel

⁴ Art V of the New York Convention does not allow a conflict with a court decision as a ground for refusal and recognition of an arbitral award.

court action is in breach of the arbitration agreement; and (in cases of irreconcilability between the arbitral award and a parallel court award), giving primacy to the arbitral award. These sorts of measures may be essential in order to protect international commercial arbitration from the procedural inefficiencies which may arise out of parallel proceedings, and which constitute a considerable threat to the success of international arbitration within the EU.

Until the CJEU decision in *Gazprom*⁵, it appeared that the courts of Member States had limited scope to place such restrictions on parallel proceedings; that such restrictions were very likely to be in conflict with Brussels I and therefore in breach of the general principle of effectiveness of EU law.⁶ Moreover, prior work on *Gazprom*, whilst focusing on the newly discovered powers of the arbitral tribunal to order an anti-suit injunction, did not go into the wider implications of the decision when read in light of the recast Brussels I and on the impact it has on the principle of effectiveness of EU law.⁷ This article is therefore timely and significant because it demonstrates that the impact of the principle of effectiveness on the interface between arbitration and Brussels I has diminished post *Gazprom* and recast Brussels I. The argument is that, while there is no outright obligation in Brussels I which prevents parallel proceedings, the revisions in recast Brussels I, along with the *Gazprom* interpretation of key non-revised parts of Brussels I, *do* certainly provide improved support for international commercial arbitration by giving more scope to national courts to restrict Parallel Proceedings,

⁵ Case C-536/13, *Gazprom OAO v Lietuvos Respublika* EU:C:2015:316.

⁶ Case C-185/07, *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* [2009] ECR I-00663.

⁷ CP Ojiegbe, "From *West Tankers* to *Gazprom*: Anti-Suit Injunctions, Arbitral Anti-Suit Orders and the Brussels I Recast," (2015) 11 *Journal of Private International Law* 267, 267-268. G Carducci, "Notes on the EU CJ's ruling in *Gazprom*: *West Tankers* is Unaffected and Anti-Suit Injunctions Issued by Arbitral Tribunals Are Not Governed by EU Regulation 44/2001" (2016) 32 *Arbitration International* 111. See also E Storskrubb, "*Gazprom OAO v Lietuvos Respublika*, A Victory for Arbitration?" (2016) 41 *European Law Review* 578, 586 where the author acknowledges the diminished role of the principle of effectiveness in the context of an anti-suit injunction ordered by an arbitral tribunal.

in the ways stated above: through anti-suit injunctions issued by an arbitral tribunal; through finding parties taking parallel court action to be in breach of the arbitration agreement; and by giving primacy to the arbitral award where it is irreconcilable with a parallel court judgment.

The article is structured as follows. Section B explains the importance of international commercial arbitration as a method of dispute resolution in the business community noting that it has become ‘the normal method of resolving disputes in international transactions.’⁸ It demonstrates how parallel (court) proceedings undermine arbitration’s efficiency of proceedings and its autonomous nature. Section C explains the juridical and philosophical underpinnings of the decision of *West Tankers* in the context of Brussels I in order to fully understand the CJEU’s reasoning in *Gazprom* discussed in section D. Sections D and E demonstrate the manner in which the reforms introduced by *Gazprom* and the recast Brussels I enhance the ability of national courts to support international commercial arbitration inter alia through restrictions on parallel proceedings.

B. Introducing the threat posed by parallel proceedings to international arbitration

International arbitration is very important for the resolution of international commercial disputes, because of the scope it provides for commercial parties to make autonomous choices as to how they will resolve those disputes. In a survey conducted in 2009, 63% of large EU-based companies stated that they prefer arbitration over court litigation, and where they have a

⁸ E Gaillard and J Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, 1999), 1. Arbitration continues to enjoy its popularity as demonstrated by figures representing cases referred to institutional arbitration between 2012-2016 among leading institutions, such as the ICC, LCIA, SIAC and ICDR. See M Altenkirch and J Frohloff, “International Arbitration Statistics 2016 – Busy Times for Arbitral Institutions” (June 2017) Global Arbitration News <https://globalarbitrationnews.com/international-arbitration-statistics-2016-busy-times-for-arbitral-institutions/> accessed on 16 January 2018.

choice they prefer to arbitrate in the EU.⁹ Under the doctrine of party autonomy,¹⁰ the duties, powers, and important aspects of the arbitral procedure are founded on the arbitration agreement. This agreement often includes a choice of institutional rules to govern the proceedings, rules that seek to optimise procedural efficiency, safeguard privacy, and resolve disputes informally.¹¹ Furthermore:

the choice of arbitration may affect the substantive rights of the parties, giving the arbitrators the right to act as *amiables compositeurs*, apply broadly equitable considerations, even a *lex mercatoria* which does not wholly reflect any national system of law.¹²

International arbitration is also of very significant economic importance for the EU. It has been recognised judicially that it is in the EU's 'commercial interests' that international arbitration is safeguarded.¹³ The EU is home to the International Chamber of Commerce Court of Arbitration (Paris), the London Court of International Arbitration, the London Chartered Institute of Arbitrators, and dozens of other reputable arbitral institutions. In 2009, the arbitration industry within the EU was estimated to be worth 4 billion Euros, and that this figure

⁹ See Commission Staff Working Paper *Impact Assessment, Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Recast) (SEC/2010/1547 final), para 2.4.1.3.

¹⁰ T Carbonneau, "The Exercise of Contract Freedom in the Making of Arbitration Agreements" (2003) 36 *Vanderbilt Journal of Transnational Law* 1189, 1193. See also A Redfern and M Hunter et al, *Redfern and Hunter on International Commercial Arbitration* (Oxford University Press, 2009), Chapter 3.

¹¹ See Gaillard and Savage, *supra* n 8.

¹² Per Lord Hoffman in *West Tankers Inc. v RAS Riunione Adriatica di Sicurtà SPA and others*, [2007] UKHL 4, 17.

¹³ See the Opinion of Advocate General Darmon in Case C-190/89 *Marc Rich & Co AG v Società Italiana Impianti SpA* [the Atlantic Emperor] [1991] ECR I-3855.

was set to rise.¹⁴ Moreover, EU Member States are very commonly chosen as seats of international arbitration.

In what ways do parallel proceedings threaten the success of international arbitration within the EU? Parallel proceedings occur for a number of reasons. The most common reason is where a party brings proceedings before a national court, (allegedly) in breach of an arbitration agreement. This is sometimes done in the genuine belief that the agreement to arbitrate is invalid, void, or inoperable.¹⁵ However, unfortunately, sometimes parallel proceedings are brought in bad faith solely to delay the arbitral proceedings by taking advantage of slow national court procedures.¹⁶ If these parallel proceedings prove to be lengthy, and arbitral proceedings have already commenced, this poses a serious threat to the efficiency of the arbitral proceedings, and also of course, hinders the aggrieved party's access to an effective remedy. This may in turn encourage parties to arbitrate their disputes in a place

¹⁴ See Commission Staff Working Paper *Impact Assessment*, *supra* n 9, para 2.4.1.3.

¹⁵ JP Fierens and B Volders, "Monetary Relief in Lieu of Anti-Suit Injunctions for Breach of Arbitration Agreements" (2012) 9 *Revista Brasileira De Arbitragem* 92.

¹⁶ See Commission Staff Working Paper *Impact Assessment*, *Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* (Recast), *supra* n 9, para 2.4.1.1. See also R Fentiman, *International Commercial Litigation* (Oxford University Press, 2015), para 16.39 where the grant of an anti-suit injunction in restraint of Parallel Proceedings is founded on preventing injustice to the claimant. This is often shown by pointing to unconscionable conduct by the respondent such as a breach of a contract, or abuse of the process of the English court or if conduct of the respondent is 'otherwise vexatious or oppressive proceedings in breach of a contract (arbitration agreement) cannot be granted unless to prevent injustice'. See also *ICC Commission Report: Decisions on Costs in International Arbitration* (ICC Dispute Resolution Bulletin, 2015, Issue 2) https://www.iccgermany.de/fileadmin/user_upload/Content/Schiedsgerichtsbarkeit/Decisions_on_Costs_in_International_Arbitration.pdf accessed on 21 December 2017, para 79(v). Cf *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* (COM/2009/0174 final), para 3.4.

outside the EU which provides more ‘legal certainty about the arbitral proceedings’, making the EU less attractive as a seat of international arbitration.¹⁷

Brussels I is the main EU instrument harmonising the jurisdiction of the courts and recognition of judgments in civil and commercial law matters. As we shall outline below, the relationship of Brussels I to arbitration is a complex one, but for present purposes it suffices to say that Brussels I does not offer an explicit solution to the problem of parallel proceedings.¹⁸ Equally, there is no convincing solution to the problem of parallel proceedings under international law or documents. International law responds to the threat of parallel proceedings in Article II of the New York Convention, which requires the national court to stay proceedings brought in breach of an arbitration agreement unless the court finds that the arbitration agreement is void, voidable, inoperative or incapable of being performed.¹⁹ The qualification of the duty to stay, which is subject to the national law of the court seised of the parallel proceedings, has allowed too much scope for the national courts when deciding whether the arbitration agreement is formally or materially invalid. More often than not the assessment whether or not to stay could take a long period of time depending on the time it takes a national

¹⁷ Commission Staff Working Paper *Impact Assessment*, *supra* n 9, para 2.4.1.1.

¹⁸ The system of the Brussels I Regulation, Council Regulation No 44/2001 (EC) of 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L12/1, in Arts 27-29 (29-32 in the Recast) offers an explicit solution which reduces the risk of parallel proceedings before various courts of Member States (parallel court proceedings where arbitration is not involved) on similar or related causes of action involving the same parties (*lis pendens*).

¹⁹ Art II of the New York Convention.

court to determine the validity of the arbitration agreement²⁰, and whether or not the national court has a favourable attitude to international commercial arbitration.²¹

Certain solutions to the problem of parallel proceedings have been introduced at national level.²² For example, English courts often issue an anti-suit injunction restraining a party from pursuing or continuing court proceedings brought in breach of a valid arbitration agreement.²³ The problem, as we are about to see, is that in *West Tankers*²⁴ the CJEU held that this use of an anti-suit injunction by the English courts offended the principle of effectiveness of EU law. Potentially this ruling could be extended to capture more situations than had been intended to by the CJEU. This risk was particularly relevant in the *Gazprom* decision. *West Tankers* had given the impression that EU law stands as an obstacle to Member States who seek to protect the system of international commercial arbitration.

²⁰ Certain systems apply a prima facie review of the arbitration agreement, however, other systems apply a full review. Moreover, where a tribunal is constituted certain systems leave the assessment of the validity of the arbitration agreement to the arbitral tribunal utilising the doctrine of negative competence-competence. See Art 1448 of the French Code of Civil Procedure, Decree No. 2011-48 of 13 January 2011 which entered into force on 1 May 2011, Book IV of the Code of Civil Procedure (CCP), Arts 1442 to 1527.

²¹ In the Case of *Allianz SpA*, *supra* n 6, Italian procedural law demonstrated its inefficiency in dealing with the core question of whether the arbitral agreement between the parties was valid. Moreover, Italian law does not recognise that a subrogated party is bound by an arbitration agreement included in the contract between the beneficiary and a third party, whereas the English court held the opposite view. See *West Tankers*, *supra* n 12.

²² National law is relevant where the matter is deemed to fall outside the scope of Brussels I, insofar as it concerns proceedings involving a matter relating to arbitration.

²³ Anti-suit injunctions are equitable remedies mostly used as a procedural mechanism by common law courts in order to prohibit parties from pursuing court proceedings in breach of a choice of court or arbitration agreement. See Ojiegbe, *supra* n 7, 267-268 for a further discussion on this point. See also T Hartley, “The Brussels I Regulation and Arbitration” (2014) 63 *International and Comparative Law Quarterly* 843.

²⁴ *Allianz SpA*, *supra* n 6.

C. The treatment of parallel proceedings under the system of Brussels I

This section explains the juridical and philosophical underpinnings of Brussels I which become relevant when dealing with the interface between Brussels I and international arbitration and come to the fore in the problematic situations described above relating to parallel proceedings. This is key to properly understanding the reasoning in the *Gazprom* case, the revisions made by the recast Brussels I and the implications of both for improving the Member States' ability to protect international arbitration from a potentially over-permissive application of the principle of effectiveness of EU law.

1. The Early Years leading to West Tankers

Brussels I is concerned with determining which courts (i.e. from which EU country) have jurisdiction over any given civil or commercial dispute, and with the recognition and enforcement of judgments made in other Member States. The only reference to arbitration in the text of the original Brussels I is in Article 1(2)(d), which simply states that 'arbitration' is excluded from its scope.²⁵ The Jenard Report on the interpretation of the Brussels Convention explained that the exclusion of arbitration was intended to prevent an overlap between the Brussels Convention and treaty law on international commercial arbitration, particularly the New York Convention.²⁶

At the time leading to the accession of the UK to the Brussels Convention a committee led by Lord Kilbrandon advised that the exclusion of arbitration from the Brussels Convention

²⁵ The same was included in the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters OJ L 299, 31/12/1972 P. 0032-0042, which was the predecessor of the Brussels I Regulation.

²⁶ *Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, Signed at Brussels, 27 September 1968 prepared by P Jenard (OJ 1979 C 59/1), 13.

“should be understood in the widest sense.”²⁷ The meaning of “widest sense” was later fleshed out by the UK representatives to include “all disputes which the parties had effectively agreed should be settled by arbitration, including any secondary disputes connected with the agreed arbitration.”²⁸ However, the original Member States of the EU understood the exclusion to only include court proceedings in a Member State concerning arbitration, whether concluded, in progress or yet to be begun.²⁹

The Schlosser Report stressed that the term ‘arbitration’ under Article 1 could not extend to every dispute that was affected by an arbitration agreement.³⁰ The report drew a distinction between proceedings which were directly concerned with arbitration and proceedings which only incidentally concerned arbitration. Proceedings which were directly concerned with arbitration as the principal issue (e.g. the establishment of the tribunal, annulment or the recognition of the validity or defectiveness of an award) were outside the scope of the Brussels Convention. But where arbitration arose as an incidental question, eg the verification of the validity of an arbitration agreement which was relied on by a litigant in order to contest the jurisdiction of the court before which he was being sued pursuant to the Brussels Convention, the litigation fell within the scope of the Convention.³¹

In *Marc Rich & Co. v. Societa Italiana Impianti*,³² the CJEU ruled that when deciding whether proceedings fall outside the scope of the Regulation, reference must be made solely to the subject matter of the dispute. Where the subject matter of the dispute falls outside the scope

²⁷ *Ibid.*

²⁸ Opinion of Advocate General Kokott in *West Tankers*, EU:C:2008:466, para 39, citing the Schlosser Report, *infra* n 31 at para 61.

²⁹ *Ibid.*

³⁰ *Report on the 1978 Accession Convention to the Brussels Convention by Professor Peter Schlosser* (OJ 1979 C 59/71), para 62.

³¹ See also the *Evrigenis and Kerameus Report on the Accession of the Hellenic Republic to the Community Convention on jurisdiction and the enforcement of judgments in civil and commercial matters* (OJ 1986 C298/1), para 35.

³² Case C-190/89 [1991] ECR I-3855.

of the Regulation, such as a dispute concerning the appointment of an arbitrator, or a declaration regarding the question of the validity of the arbitration agreement, the exclusion from the scope of Brussels I in Article 1(2)(d) applies. Another important decision by the CJEU on the scope of Article 1(2)(d) was the *Van Uden Maritime v. Deco-Line*³³ decision regarding provisional measures that concerned the relationship between Article 1(2)(d) and Article 31 of Brussels I. Relying on the reasoning in *Marc Rich* the Court decided that Article 24 may confer jurisdiction on the court hearing an application for a provisional measure despite the fact that proceedings had commenced on the substance of the case before an arbitral tribunal (in arbitration).³⁴

The above restrictive application of Article 1(2)(d) allows the Regulation to engage even in situations where the parties had exclusively agreed to resolve the dispute by arbitration. One important repercussion of this engagement is that it brings into operation the principles of ‘mutual trust’, and ‘effectiveness of EU law’. Mutual trust prohibits a court of a Member State from assessing the appropriateness of bringing proceedings before a court of another Member State which is seised of proceedings under Brussels I.³⁵ Observing the principle of mutual trust is important because it respects Member States’ courts’ sovereign power to determine their own jurisdiction.³⁶ The principle of effectiveness of EU law means that any national legal provision or any legislative, administrative or judicial practice which might obstruct an

³³ Case C-391/95, *Van Uden Maritime v. Deco-Line* [1998] ECR I-7091.

³⁴ *Ibid*, para 34.

³⁵ See Case C-159/02, *Turner v Grovit, Harada Ltd and Changepoint SA* EU:C:2004:228, paras 28-29. It requires for example a court of a Member State not to issue an anti-suit injunction to prevent parallel proceedings in another Member State, but rather to trust a court of another Member State seised of parallel proceedings to stay or decline proceedings should the proceedings before it be brought in breach of a valid arbitration agreement. See *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc supra* n 6, para 19. See full discussion of *West Tankers* in section C2 below.

³⁶ European Parliament, Directorate General for Internal Policies, Policy Department: *Citizens’ Rights and Constitutional Affairs, Possibility and terms for applying Brussels I Regulation (recast) to extra-European disputes*, PE [2014], 13.

effective application of EU law and prevent it from being implemented in its entirety is contrary to EU law.³⁷

The side effect of the application of such principles is that in successive CJEU decisions they stood in the way of national measures aimed at preventing parallel proceedings. *Gasser v Misat*,³⁸ for example, involved an Italian party which started proceedings in Italy in breach of an exclusive forum selection agreement conferring jurisdiction on the Austrian courts. There was a reasonable suspicion that the proceedings had been primarily motivated by dilatory tactics before the Italian court. The court decided that it would be contrary to the principles of mutual trust and certainty of proceedings to allow a court of a Member State to ignore the *lis pendens* provision simply because the court first seised was either seised mainly for dilatory tactics by a debtor, or because the duration of proceedings in the seised forum were excessively long.³⁹ In *Turner v Grovit* an anti-suit injunction was issued by the English court in protection of English court proceedings (as opposed to arbitral proceedings in *West Tankers*) ordering a party to stop proceedings before the Spanish court. The CJEU found that such an injunction would limit the application of Brussels I, and would therefore impair its effectiveness.⁴⁰

2. *West Tankers bringing to the fore the principles of ‘mutual trust’ and ‘effectiveness of EU law’.*

In *West Tankers*, where the legality of an anti-suit injunction issued by the English High Court in restraint of Italian court proceedings brought (allegedly) in breach of an arbitration

³⁷ See Case 106/77, *Simmenthal* [1978] ECR 829.

³⁸ Case C-116/02, *Erich Gasser GmbH v MISAT srl* EU:C:2003:657.

³⁹ *Ibid*, paras 68-69.

⁴⁰ *Turner v Grovit*, *supra* n 35, para 29.

agreement was concerned, the Supreme Court of the United Kingdom made a preliminary reference to the CJEU asking whether:

it is incompatible with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement, even though Article 1(2)(d) of the Regulation excludes arbitration from the scope thereof.⁴¹

Advocate General Kokott stressed that the use of an anti-suit injunction undermines the underlying principle of trust and confidence which is important to the system of Brussels I, and is contrary to the general principle that every court seised itself determines whether it has jurisdiction to resolve the dispute. At the core of the AG's opinion was that anti-suit injunctions are contrary to the principle of effective judicial protection which is so essential to the EU internal market and the system of Brussels I.⁴² Whilst acknowledging that in exceptional circumstances preserving the principle of effectiveness would inevitably lead to parallel proceedings, the AG expressed her trust in national courts, stating that if an arbitration agreement is invalid there will be no reason why a national court would not stay proceedings and refer the parties to arbitration in accordance with Article II of the New York Convention, which all Member States are parties to.⁴³ The problem with this analysis is that the efficiency of the proceedings could fall hostage to a slow tactical litigation in a national civil justice

⁴¹ *Allianz SpA*, *supra* n 6, para 19.

⁴² Opinion of Advocate General Kokott, *supra* n 28, para 58.

⁴³ Opinion of Advocate General Kokott, *supra* n 28, para 73. In relation to the principle of mutual trust see *Gasser*, *supra* n 38. *Gasser* was criticised for having a formalistic approach favouring adherence to Brussels I over considerations of procedural justice, see eg R Fentiman, "Access to Justice and Parallel Proceedings in Europe" (2004) 36 *Cambridge Law Journal* 261, 314.

system that permits such litigation therefore potentially compromising the efficiency values that the New York Convention and Brussels I promote in the first place.

The AG's opinion was endorsed by the CJEU. The Court relied on *Marc Rich & Co. v. Societa Italiana Impianti*⁴⁴ and treated the assessment of the validity of the arbitration agreement as a matter incidental to the main proceedings which fell within the scope of Brussels I. Consequently, the assessment of the validity of the arbitration agreement fell within the scope of Brussels I.⁴⁵ The CJEU then ruled that the use of an anti-suit injunction 'would amount to stripping that court of the power to rule on its own jurisdiction'.⁴⁶ It can be argued that according to this reasoning such a measure would undermine the 'trust' between Member States in the Brussels I system, depriving a party from access to a judicial remedy.⁴⁷ The CJEU reasoned that the anti-suit injunction was in conflict with the principle of effectiveness of EU law.

Therefore, the principle of effectiveness of EU law has the potential to stand in the way of a Member State's ability to control parallel proceedings. In *West Tankers* the threat resided in its elusive nature and the misleading impression which was left by the court that the principle of effectiveness of EU law calls for a rigid application. This was partially caused by the lack of appreciation by the court of the implications that the principle may have on future use of national measures aimed at restraining parallel proceedings, and by the brief analysis of the principle and its implication to measures that go beyond the legality of anti-suit injunctions. For this reason, the next section will explore in more details the principle of effectiveness and to explain its limits under the EU constitutional order, and the reforms which were brought by recast Brussels I.

⁴⁴ *Supra* n 32.

⁴⁵ *Marc Rich*, *supra* n 32 and *Allianz SpA*, *supra* n 6, paras 23 and 24. See also T Raphael, *The Anti-Suit Injunction Updating Supplement* (Oxford University Press, 2010), para 12.06.

⁴⁶ *Allianz SpA*, *supra* n 6, para 28.

⁴⁷ For example see recitals 1,3,16 and 17 of the Brussels I Regulation, *supra* n 18.

(a) *The principle of effectiveness of EU Law in the context of West Tankers and Brussels I:*

It was held in *West Tankers* that the imposition of an anti-suit injunction would undermine the principle of effectiveness of EU law, more specifically it would undermine the Brussels I Regulation.⁴⁸ The Court held that the anti-suit injunction issued by a Member State court would deny a party access to a judicial remedy.⁴⁹ The CJEU reasoned that the anti-suit injunction prevented the respondent from commencing and continuing litigation proceedings before the Tribunale di Siracusa.⁵⁰ This in turn prevented the party from being able to benefit from an adequate protection of its rights of access to a remedy through the engagement of Article 5(3) of the Brussels I Regulation.⁵¹ By ordering a party to stop proceedings before a court of a Member State, the anti-suit injunction challenged the Italian court's freedom to determine its own jurisdiction in accordance with the provisions of the Brussels I Regulation.⁵² According to the CJEU, this also undermined the 'trust' between Member States that is fundamental to the current system of the Brussels I Regulation.⁵³

⁴⁸ *Allianz SpA*, *supra* n 6, para 24.

⁴⁹ *Ibid*, paras 28-31. Y Farah and S Hourani, "Frustrated at the Interface between Court Litigation and Arbitration? Don't Blame it on Brussels I! Finding Reason in the Decision of *West Tankers*, and the Recast Brussels I" in P Stone and Y Farah (eds), *A Research Handbook on EU Private International Law* (Edward Elgar Publishing, 2015) 134.

⁵⁰ *Allianz SpA*, *supra* n 6, para 31.

⁵¹ Y Farah and S Hourani, *supra* n 49, 136.

⁵² Sir A Clarke, "The Differing Approach to Commercial Litigation in the European Court of Justice and the Courts of England and Wales" (2007) *European Business Law Review* 101, 115-119 in P Santomauro, "Sense and Sensibility: Reviewing *West Tankers* and Dealing with its Implications in the Wake of the Reform of EC Regulation 44/2001" (2010) 6 *Journal of Private International Law* 281, 293.

⁵³ *Allianz SpA*, *supra* n 6, para 30.

It is important therefore to understand the meaning and limits of the principle of effectiveness of EU law. The principle of effectiveness is a fundamental aspect of EU law.⁵⁴ It is used by the CJEU as a rule for the interpretation of EU law.⁵⁵ It was emphasised as a constitutional principle of EU law in the case of *Factortame I* as a way of establishing a more effective application of EU rights by the national courts.⁵⁶ The Court held in this case that any national legal provision or any legislative, administrative or judicial practice which might obstruct an effective application of EU law and prevent it from being implemented in its entirety was contrary to EU law.⁵⁷ The CJEU established the importance of the principle of effectiveness in this case as it allowed for the protection of the right to judicial redress available under EU law. This protection would thereafter apply as a general obligation for courts of Member States to give adequate effect to EU law in their decision making.⁵⁸

The main function of the principle of effectiveness is to impose an obligation upon the national courts of Member States to give adequate effect to the rights and duties imposed by EU law.⁵⁹ This means that national courts in the EU should give priority to the application of EU law, its purpose and objectives, by not making the enforcement of EU rights and remedies impossible or excessively difficult.⁶⁰ More particularly, the courts must give effect to the purpose and objectives of EU legislative texts through the application of this constitutional

⁵⁴ P Craig and G De Búrca, “*EU Law: text, cases, and materials*”, (Oxford University Press, 2011) 218.

⁵⁵ S Mayr, “Putting a Leash on the Court of Justice? Preconceptions in National Methodology v *Effet Utile* as a Meta-Rule” (Autumn/Winter 2012/13) 5 *European Journal of Legal Studies* 8, 11.

⁵⁶ Case-C-213/89, *R v Secretary of State for Transport, ex parte Factortame Ltd and Others* [1990] ECR I-2433.

⁵⁷ See also Case 106/77, *Simmenthal* [1978] ECR 829.

⁵⁸ Craig and De Búrca, *supra* n 54, 218.

⁵⁹ *Ibid*, 218.

⁶⁰ See C Mak, “Rights and Remedies: Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters”, in H Micklitz (ed), *Private Law Collected Courses EUI Summer School ‘The Constitutionalization of European Private Law’* (Oxford University Press, 2014).

principle.⁶¹ Consequently, if no EU law rights and remedies are at stake this principle would not be applied by the national Member State courts.

Article 47 of the EU Charter of Fundamental Rights confirms the principle of effectiveness of EU law. The Article provides that:

everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

The CJEU uses this proposition as a foundation for the application of the principle.⁶² Therefore, the principle of effectiveness allows for an effective protection of individuals' EU rights and remedies. The constitutional value of the principle of effectiveness is said to be enshrined in Article 19(1) of the TEU which provides that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.⁶³

The right of access to remedies under EU law is closely linked with the right of access to justice as it would not be possible to have such a right without adequate access to justice.⁶⁴ The CJEU places an emphasis on the right of access to justice and securing adequate remedies arising from EU law, as can be seen from cases such as *Heylens*,⁶⁵ *Tele2*⁶⁶ and *Mono Car*

⁶¹ Mayr, *supra* n 55, 11.

⁶² Craig and De Búrca, *supra* n 54, 218. For example, see Cases C-317/08, 318/08 and 320/08, *Rosalba Alassini and others* [2010] ECR I-02213.

⁶³ See T Hartley, *The Foundations of European Union Law* (OUP, eighth edition, 2014), 145.

⁶⁴ See Mak, *supra* n 60.

⁶⁵ Case 222/86 *UNECTEF v Heylens* [1987] ECR 4097.

⁶⁶ Case C-426/05 *Tele2 Telecommunication GmbH v Telekom-Control-Kommission* [2008] ECR I-68.

Styling.⁶⁷ The CJEU held in these cases that the right of access to justice was crucial for the enforcement of EU law rights.⁶⁸

To sum up, the idea of the referral to arbitration by the anti-suit injunction was not in itself an obstacle to the party's right of access to justice in *West Tankers*.⁶⁹ It was rather the denial of access to the remedies found under the Brussels I Regulation that was problematic.⁷⁰ The principle of effectiveness affected the English court's ability to protect the integrity of international arbitration proceedings as it restricted it from issuing an anti-suit injunction against the court of another Member State. It was considered by the CJEU that such an anti-suit injunction would pose a threat to the unification of judgments within the EU.⁷¹ According to this line of argument, such a threat would undermine the effectiveness of the Brussels I Regulation in reaching its objective of creating a unified internal market that consists of free movement of court decisions allowing for legal protection and certainty.⁷² Thus, not applying the principle of effectiveness of EU law in the context of the *West Tankers* case would have meant that the party would have been deprived from having access to the remedy of the Italian court and not gaining the fundamental legal protection it was entitled to.

(b) *The limits of the principle of effectiveness of EU Law in the context of parallel proceedings*

It is important not to exaggerate the influence of the principle of effectiveness in the context of conflicts between arbitration and court litigation. It is established law under the CJEU jurisprudence that the principle of effectiveness, which was originally founded on allowing

⁶⁷ Case C-12/08 *Mono Car Styling SA, in liquidation v Dervis Odemis and Others* [2009] ECR I-6653.

⁶⁸ Craig and De Búrca, *supra* n 54, 236-237.

⁶⁹ Farah and Hourani, *supra* n 49, 137.

⁷⁰ *Ibid*, 137.

⁷¹ *Allianz SpA, supra* n 6, para 24.

⁷² P Santomauro, *supra* n 52, 293.

some procedural autonomy to Member States, is not an absolute principle.⁷³ It goes without saying that EU law must be engaged, directly, or indirectly, before one is able to argue that a national measure obstructs the effectiveness of EU law. In *West Tankers* EU law was engaged by the fact that the party would have been hindered in accessing a judicial remedy in Italy if the Italian courts did not have jurisdiction under the Brussels I Regulation to determine whether the arbitration agreement was valid.⁷⁴

Even where EU law is not engaged, cases suggest that the determination of the compatibility of a national procedural rule with the principle of effectiveness, such as that in *West Tankers*, depends on the facts of each case.⁷⁵ Its application is subject to a test of proportionality, taking into consideration the purpose behind the offending national measure on the one hand and the restrictive effect of that measure on EU law on the other, bearing in mind the particular circumstances of the case.⁷⁶ Much, therefore, depends on the objective(s) behind the national measure and the degree of effect it may have on the application of EU law. For example, the enforcement of a partial award declaring that a party will be entitled to an indemnity against damages awarded by a national court seised in parallel proceedings should not be deemed to be incompatible with the principle of effectiveness. This is reinforced by Article 73(2) of the Recast Brussels I which clearly gives precedence to the New York Convention, and therefore, the objective behind the offending national measure would be supportive of the policy considerations of Brussels I. The above discussion highlights the importance of the principle of effectiveness as well as its limits. In the next section it will be

⁷³ Speech in February 2014 by M Safjan, President of a Chamber, CJEU, *A Union of Effective Judicial Protection: Addressing a multi-level challenge through the lens of Article 47 of CFREU* <https://www.kcl.ac.uk/law/research/centres/european/Speech-KINGS-COLLEGE.pdf> accessed on 13 December 2016.

⁷⁴ See *Allianz SpA*, *supra* n 6, paras 29-31.

⁷⁵ *Craig and De Búrca*, *supra* n 54, 322.

⁷⁶ *Ibid*, 322.

demonstrated that the CJEU in *Gazprom* relaxed the application of the principle of mutual trust and effectiveness of EU law, and therefore provided improved support for national courts' ability to restrict parallel proceedings.

D. The Decision of the CJEU in *Gazprom*

1. *The Issue in Gazprom*

The basic background to the *Gazprom* case is that Lithuania, represented by the Lithuanian Ministry of Energy, made an application to the Vilniaus apygardos teismas (Regional Court, Vilnius) seeking initiation of an investigation in respect to the activities of the general manager of Lietuvos dujos, a company formed under Lithuanian law, and in respect to a Mr Golubev and Mr Seleznev, Russian nationals who were appointed to its board of directors by Gazprom (a company formed in the Russian Federation). Gazprom held a 37.1% stake in Lietuvos dujos and Lithuania held 17.7%.⁷⁷

In August 2011, Gazprom filed a request for arbitration against the Ministry of Energy at the Arbitration Institute of the Stockholm Chamber of Commerce in accordance with the arbitration agreement which was contained in the shareholders' agreement between Gazprom and the Lithuanian State. Responding to Gazprom, in an award of 31 July 2012, the arbitral tribunal declared that the arbitration clause contained in the shareholders' agreement between the disputants had been partially breached and ordered the Ministry to withdraw or limit some of the claims which it had brought before that court. The Vilniaus apygardos teismas having considered that the investigation of the activities of a legal person fell within its jurisdiction, ordered in September 2012 that an investigation of the activities of Lietuvos dujos be initiated, which was followed by an appeal by Gazprom against that decision before the Court of Appeal of Lithuania.

⁷⁷ *Gazprom*, *supra* n 5, para 12.

In separate proceedings, Gazprom applied to the Lithuanian Court of Appeal for recognition and enforcement in Lithuania of the arbitral award of 31 July 2012. The Court of Appeal refused Gazprom's application holding that firstly, the arbitral tribunal which made the arbitral award could not rule on an issue already raised before and examined by the Vilniaus apygardos teismas, and that secondly, in ruling on that issue, the arbitral tribunal had not observed Article V(2)(a) of the New York Convention.⁷⁸ Thirdly, the arbitral tribunal not only limited the Ministry's capacity to bring proceedings before a Lithuanian court with a view to initiation of an investigation in respect of the activities of a legal person but also denied that national court the power which it possessed to determine whether it had jurisdiction. According to the Lithuanian Court of Appeal, to recognise the award would have violated Lithuania's national sovereignty and thus its refusal was justified on public policy grounds available under Article V(2)(b) of the New York Convention.

In the appeal to the Supreme Court of Lithuania, that court decided to stay proceedings and make a preliminary reference to the CJEU asking for a ruling on three questions: Firstly, whether a court of a Member State has the right to refuse to recognise an award issued by an arbitral tribunal prohibiting a party from bringing certain claims before the court of that Member State, which has the jurisdiction to hear the civil case as to the substance under Brussels I; Secondly, if the first question was to be answered in the affirmative, whether the same also applied where the anti-suit injunction issued by the arbitral tribunal orders a party to the proceedings to limit his claims in a case which is being heard in another Member State and the court of that Member State has jurisdiction to hear that case under the rules on jurisdiction under Brussels I. Finally, whether a national court, seeking to safeguard the primacy of EU law and the full effectiveness of Brussels I, can refuse to recognise an award if such an award

⁷⁸ *Supra* n 3.

restricts the right of the national court to decide on its own jurisdiction and powers in a case which falls within the jurisdiction of Brussels I.⁷⁹

The CJEU chose to answer the questions together and treated the questions to mean in essence whether:

Regulation No 44/2001 must be interpreted as precluding a court of a Member State from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State.⁸⁰

The CJEU chose not to deal with the second question directly. If it had, this would have broadened the scope of its reasoning to include situations where the enforcement of the arbitral award would affect court proceedings occurring in a court of another Member State, e.g. a French court seised with a request to recognise and enforce an arbitral award ordering a party to refrain from pursuing court litigation before an Italian court exercising jurisdiction under Brussels I.

2. The decision of the CJEU

The main preliminary question in *Gazprom* was answered by the CJEU in the negative for two main reasons. Firstly, the CJEU reasoned that the anti-suit injunction was issued by an arbitral tribunal and not by a court of a Member State fell outside the scope of Brussels I under Article 1(2)(d).⁸¹ Secondly, the court distinguished the case from *West Tankers* because arbitral tribunals do not have the legal status of Member State courts despite sharing similarities in

⁷⁹ *Gazprom*, *supra* n 5, para 26. The Lithuanian court contended that this injunction would restrict a national court's right to determine its own jurisdiction to hear the case which would go against the concepts of safeguarding the primacy of EU law and the full effectiveness of the application of the Brussels I Regulation.

⁸⁰ *Ibid*, para 27.

⁸¹ *Ibid*, para 36.

their roles as both issue binding decisions.⁸² Therefore, neither the Swedish arbitration institution's anti-suit order nor any decision of a Lithuanian court to recognise and enforce it conflicts with the principle of mutual trust.⁸³ As a result enforcement of the anti-suit order would not be contrary to the principle of effectiveness of EU law and any other general principles of EU law.⁸⁴

The rationale behind the CJEU's findings in *Gazprom* is not free from contention. According to the CJEU the anti-suit order in *Gazprom* which was issued by an arbitral tribunal has different effects to the anti-suit injunction that was issued by a court in the case of *West Tankers*.⁸⁵ The CJEU held that the reason behind this difference is that the former type would still need to be recognised and enforced as an arbitral award by a national court and would be subject to the limitations on recognition and enforcement provided for by the New York Convention.⁸⁶ Moreover, the CJEU stated that failure to comply with an anti-suit order issued by an arbitral tribunal by the party subject to that order (such as the one in *Gazprom*) does not lead to an imposition by a court of a Member State of a penalty on that party. Consequently this would not be the court of one Member State directly interfering with the jurisdiction of the court of another Member State.⁸⁷ It would have been much more compelling had the court placed emphasis in its reasoning on the private nature of arbitration and perhaps resurrected some of the rationale which was advanced by the English decision in *CMA CGM SA v Hyundai*

⁸² Cp Ojiegbe *supra* n 7, 285 footnote 115; also see G Carducci, "Notes on the EUCJ's ruling in *Gazprom: West Tankers* is Unaffected and Anti-Suit Injunctions Issued by Arbitral Tribunals Are Not Governed by EU Regulation 44/2001", *supra* n 7, 9.

⁸³ See *Gazprom OAO v Lietuvos Respublika*, *supra* n 5, paras 29, 37 and 39.

⁸⁴ See *ibid*, para 33.

⁸⁵ See *ibid*, para 40.

⁸⁶ *Ibid*, para 38.

⁸⁷ See *ibid*. This was not the situation under *West Tankers* as can be seen from the CJEU's statement in *Gazprom*, *supra* n 5, under para 33 that an anti-suit injunction issued by a court of a Member State against another one would be contrary to the general principle that each court has the right to determine its own jurisdiction as per Brussels I.

Mipo Dock Yard Co. Ltd.,⁸⁸ where in a sweeping statement Burton J held that arbitrators are not bound by the Brussels I Regulation. This reasoning by the court has been given further support by the reform in recital 12 of the recast Brussels I. The implication of this reasoning is that arbitrators will be able to grant an anti-suit injunction in situations where an equivalent injunction by the court would be in breach of Brussels I.⁸⁹

Moreover, the above reasoning of the CJEU does not go well when considering some of the powers that are available to arbitral tribunals within the practice of international commercial arbitration. A party which breaches a tribunal's order can still be found to be liable under normal civil liabilities, such as breach of the arbitration agreement, and all damages that arise out of that breach. Moreover, there are points of similarity regarding the effects produced by an anti-suit injunction issued by an arbitral tribunal and one issued by a court of a Member State as both will have a *de facto* interference with the jurisdiction of another court of a Member State.⁹⁰ Be that as it may, the CJEU sent a strong message that the type of interference experienced in *Gazprom* falls outside the constrictions placed by its previous decision in *West Tankers*. In this situation, the national courts (the Lithuanian courts) have to assess whether or not to enforce the arbitral award under the New York Convention.⁹¹

⁸⁸ [2008] EWHC 2791 (Comm), [2009] 1 Lloyd's Rep, 213. See also H Seriki, *Injunctive Relief and International Arbitration* (Informa Law, Routledge, 2014) para 5.12.

⁸⁹ Seriki, *ibid*, paras 5.11-5.13.

⁹⁰ See A Leandro, "Towards a New Interface Between Brussels I and Arbitration?" (2015) 6 *Journal of International Dispute Settlement*, 188, 198.

⁹¹ It is worthwhile noting that under most legal systems an anti-suit injunction ordered by an arbitral tribunal will be treated as a procedural order and will not be given the status of an arbitral award. This is so because an award is a final decision putting an end to an issue on the merits either in whole or in part. It may be a procedural matter but that usually requires that the decision of the tribunal would put an end to the proceedings such as a decision on the jurisdiction of the tribunal. See *ICCA's Guide to the Interpretation of the 1958 New York Convention with assistance of the Permanent Court of Arbitration Peace Palace, The Hague* (2011),

http://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf accessed on 10 July 2017. See also Cass Civ 1, October 12 2011, *Groupe Antoine Tabet v République du Congo*, Z 09-72.439. An anti-suit injunction does not perform such a function and it is often used in aid of the proceedings to assist in bringing the proceedings forward. This

Thus the *Gazprom* decision is a welcome step which confirms the EU's commitment towards the protection of the system of international commercial arbitration. *Gazprom* unlocks the potential use of procedural orders by a tribunal in protection of the arbitral proceedings,⁹² supported by the power to issue a peremptory order, under certain national arbitration laws, if a party without showing sufficient cause, fails to comply with any order or directions of the tribunal.⁹³ Moreover, if a claimant fails to comply with such order the tribunal may 'make such order as it thinks fit as to the payment of costs of the arbitration incurred in consequence of the non-compliance.'⁹⁴

However, we must issue a word of caution as to the actual impact that *Gazprom* will have. Firstly, the example of the interim award (anti-suit order) made by the tribunal can be challenged under Article V(1)(a) of the New York Convention,⁹⁵ or based on arbitrability or the public policy exception under Article V(2) of the same convention, as was suggested by

will have two repercussions with regards to the treatment of the anti-suit injunction. Firstly, it will not be possible to challenge its validity before the national court at the seat of arbitration. Secondly, procedural orders which do not finally resolve substantive rights of the parties will not be considered an 'award' under the system of the New York Convention and therefore will not benefit from its enforcement regime. See *Braspetro Oil Servs co. V. Mgmt and Implementation Auth. Of the Greater Man-made River Project (Brasoil)*, XXIVa YBCA 296 (1999).

⁹² See for example s48(5) of the English Arbitration Act 1996 which states that a tribunal has the same powers as a national court to order a party to do or refrain from doing anything.

⁹³ S41(5) of the English Arbitration Act 1996. On the limits of peremptory orders see part 2 of CIARB Practice Guideline 14, 'Practice Guideline 14: Guidelines for Arbitrators on how to approach an application for a Peremptory and "Unless" Orders and related matters' <https://www.ciarb.org/docs/default-source/practice-guidelines-protocols-and-rules/practice-guidelines-relevant-to-the-english-arbitration-act-1996/2011preemptoryandunlessorders.pdf?sfvrsn=6> accessed on 21 July 2016.

⁹⁴ S41(7)(d) of the English Arbitration Act 1996.

⁹⁵ Art V(1)(a) stipulates that a court can refuse recognition and enforcement of a New York Convention award if the 'arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made.'

the Lithuanian Court of Appeal in *Gazprom*.⁹⁶ That very determination of whether the arbitration agreement is valid, is best resolved by the constituted arbitral tribunal in the first instance.⁹⁷

Secondly, one cannot ignore the fact that the CJEU reasoning was confined to a situation where the request of enforcement of the anti-suit order by the tribunal and the parallel court proceedings brought (allegedly) in breach of the arbitration agreement occurred within a single Member State (Lithuania).⁹⁸ Thus, a determination by that court in favour of enforcement of the arbitral award does not amount to interference with the right of a court of another Member State to determine its jurisdiction, and in turn does not constitute a breach of the principle of mutual trust. However, what if the court seised with the request to enforce the arbitral award is not the same court seised with the parallel court proceedings allegedly brought in breach of the arbitration agreement? The old regime of Brussels I would have considered the matter as falling within the limits imposed by *West Tankers* and therefore would have declared it as incompatible with Brussels I. Our analysis however in Section E4 below of this paper demonstrates that this could no longer be a limitation on the court seised with the request to enforce the arbitral award, because of the changes brought by recital 12 and Article 73(2) of the recast Brussels I.⁹⁹ Those changes give priority to the enforcement regime of the New York Convention over the application of Brussels I, including, in a broad sense giving priority over chapter II of Brussels I which deals with the jurisdiction of the courts.

⁹⁶ *Gazprom*, *supra* n 5, para 21. It appears that Supreme Court of Lithuania recognised the interim award (anti-suit order issued by the tribunal), and refused to deny recognition and enforcement based on the grounds of non-arbitrability and public policy under Art V(2) of the New York Convention. See E Storskrubb, *supra* n 7, 585.

⁹⁷ Farah and Hourani, *supra* n 49. The court at the seat of arbitration could still be able to review the decision of the tribunal on the validity of the arbitration agreement. See for example Section 31 of the English Arbitration Act 1996.

⁹⁸ See *Gazprom*, *supra* n 5, para 42.

⁹⁹ See the discussion on the irreconcilability between an award and a judgment in Section E4 of this article.

3. Gazprom releases the potential for the use of measures restricting parallel court proceedings other than an anti-suit injunction

Gazprom has released the potential for arbitral tribunals to protect the arbitral proceedings. This is a power, depending on the applicable arbitration law, that is widely given to the arbitral tribunal in order to safeguard efficiency of proceedings¹⁰⁰ whilst at the same time balancing due process.¹⁰¹ For example, in the US,¹⁰² England,¹⁰³ India,¹⁰⁴ and Australia,¹⁰⁵ to name but a few, tribunals are allowed to order interim measures. In France, as well as being able to order interim measures¹⁰⁶ the arbitrators can order conservatory or provisional measures in the form of an interim award, which will enjoy enforcement in French courts, or possibly in other jurisdictions under the enforcement system of the New York Convention.¹⁰⁷ China does not allow arbitrators to order interim measures, and therefore parties must approach Chinese courts for that purpose.¹⁰⁸

Moreover, in addition to the anti-suit relief which was the issue in *Gazprom*, the tribunal can order a party to pay damages for breach of the arbitration agreement, or can issue an

¹⁰⁰ See Art 19 of the UNCITRAL Model Law, *supra* n 2.

¹⁰¹ See *ibid*, Art 18.

¹⁰² In the US following the decision in *Yasuda Fire & Marine Ins. Co. of Europe, Ltd. v. Cont'l Cas. Co.*, 37 F.3d 345, 351 (7th Cir. 1994) arbitrators have the inherent power to order interim relief. Their enforceability by the courts depends on whether they have resolved a matter on the merits or that their enforcement is necessary to render a meaningful final award for example by securing assets.

¹⁰³ See s38(4) of the English Arbitration Act 1996.

¹⁰⁴ Art 17(1) of the Indian Arbitration Act 1996.

¹⁰⁵ See s17 of the CAA [Australia].

¹⁰⁶ Art 1468 of the Code of Civil Procedure which applies to domestic arbitration, and Art 1506(3) of the same Code which extends the application of Art 1468 to international arbitration. The arbitrator can order interim protective measures considered appropriate and attach penalties to them if deemed necessary.

¹⁰⁷ Under Art 1468(1) of the Code of Civil Procedure only courts are allowed to order conservatory attachments and judicial security.

¹⁰⁸ See Arts 26 and 48 of Arbitration Law of the People's Republic of China.

indemnity order in an attempt to pre-empt a possible success of the parallel court action. It is important to note that the tribunal's power to award damages for a breach of an arbitration agreement has the potential of being a powerful tool in defence of arbitral proceedings.¹⁰⁹ The threat of the issuance of such an order acts as a *raison d'être* for parties not to bring proceedings before the national court in breach of the arbitration agreement.

Until the decision of *Gazprom* it was not absolutely clear that an award ordering a party to pay damages for breach of the arbitration agreement would not be in conflict with Brussels I, and in turn the principle of effectiveness of EU law.¹¹⁰ For example, in *West Tankers* the tribunal was requested to make such orders by the English party which had contested the Italian court proceedings. Despite recognising that this was a matter which fell within its competence, the tribunal concluded that its power to make such awards was circumscribed by the decision in *West Tankers*.¹¹¹

The tribunal said that it was under a duty to apply Community Law. The tribunal stated that:

the ruling by the European Court means that insurers have the right under European law to bring proceedings in Syracuse. Accordingly it seems to us that a decision by this tribunal that insurers did not have that right would be impossible to sustain if the matter were tested again before the European Court. A competition between the right upheld by the European court and the right to damages would, in the present state of

¹⁰⁹ Fierens and Volders, *supra* n 15, 94-95.

¹¹⁰ See Raphael, *supra* n 45, para 12.40 that it is unclear whether the reasoning in *West Tankers* could preclude the award of damages for breach of an exclusive choice of court agreement. The author though is inclined in favour of the argument that such measures could survive the scrutiny of the principle of mutual trust.

¹¹¹ Para 77 of the tribunal as cited by Flaux J in *West Tankers Inc v Allianz SPA* [2012] EWHC 854 (Comm), [2012] 2 Lloyd's Rep 103.

Community law, result in a victory for the former. And this is so despite the specific provision in Article 1(2)(d).¹¹²

West Tankers appealed the decision of the tribunal to the English High Court, England being the seat of arbitration, under section 69 of the English Arbitration Act 1996.¹¹³ The Court allowed the appeal and held that: ‘whilst the tribunal was bound to apply European law as part of English law, the tribunal would only have to apply the principle of effective judicial protection if it were engaged, which it was not.’¹¹⁴ The English High Court therefore reasoned that the principle of effectiveness is not a free-standing principle and EU law must be engaged first before it is possible to deem a national measure incompatible with that law.¹¹⁵

Gazprom reinforced the decision of the English High Court, firstly, by stating unequivocally that tribunals are not bound by the principle of mutual trust, and secondly, despite not saying so expressly, that the principle of effectiveness does not apply where the situation is confined to a single Member State. Therefore, in such situations such requests are subject to the application of national law, and its approach on the enforcement mechanism of the New York Convention. We will see in E3 that Article 73(2) of the Recast Brussels I has the effect of allowing the application of the New York Convention even where such application would otherwise be in conflict with that Regulation.

E. The Recast Brussels I Regulation (Recast Brussels I)

While Brussels I does not impose an outright obligation on national courts to restrict parallel proceedings, the recast Brussels I certainly provides more support for international commercial

¹¹² *Ibid.*

¹¹³ S69 of the English Arbitration Act 1996. This is appeal is only allowed by the permission of the court and is only possible under tightly controlled conditions.

¹¹⁴ Para 64 of [2005] 2 All ER (Comm) 240, 253.

¹¹⁵ See *ibid.*

arbitration. It does this by relaxing the principle of mutual trust in certain situations, by restricting the application of the principle of effectiveness of EU law, and by giving priority to the New York Convention 1958. With this last measure it gives more scope to national courts to restrict Parallel Proceedings.

In order to fully appreciate the change brought about by the recast Brussels I, it is important to understand the legislative intention behind recital 12, which can be discerned from the preparatory work of the recast Brussels I. We shall also outline the amendments which have been introduced in Article 73(2) of Brussels I in so far as these affect the analysis.

1. Preparatory work of Recast Brussels I

The European Union Commission engaged in wide consultation with various stakeholders regarding the relationship between Brussels I and arbitration. The process included a green paper¹¹⁶ and numerous communications between EU institutions highlighting in part that a solution must be found to the situation that was experienced in *West Tankers*.¹¹⁷ The Commission found that many stakeholders were in favour of further action to be taken by the EU in order to avoid parallel proceedings between courts and arbitration, and "abusive litigation tactics." However, views diverged among stakeholders of whether the proper solution should be made through the exclusion of arbitration "more broadly from the scope of the Regulation,"¹¹⁸ or whether concrete substantive revisions should be included so as to

¹¹⁶ *Green Paper on the review of Council Regulation (EC) No.44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* (Com/2009/0175 final).

¹¹⁷ *Proposal for a Regulation of the European Parliament And of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)* (Com/2010/748 final).

¹¹⁸ *Ibid*, para 2.

harmonise national law approaches to parallel proceedings between court litigation and arbitration.

The EU Commission endorsed the latter view and recommended the addition to Brussels I with a new Article 29(4):

Where the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of the arbitration is located or the arbitral tribunal have been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement.¹¹⁹

The Council of the EU rejected the proposed addition. Instead, the final version placed emphasis on reforms to the recitals of Brussels I. This was also the view of the European Parliament which strongly rejected including a solution to the problem of parallel proceedings in Brussels I (recast),¹²⁰ which in effect would have meant a partial abolition of the exclusion of arbitration from the scope of Brussels I. The European Parliament took account of the diversity in approach found under national law to parallel proceedings. This diversity is present among national laws despite an increasing movement towards internationalisation of arbitration through permissive reading of national law, international harmonisation, and often through a process of delocalisation.¹²¹ A more interventionist approach by Brussels I in the

¹¹⁹ *Proposal for a Regulation of the European Parliament And of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)*, *supra* 117, 36.

¹²⁰ *European Parliament Resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (P7_TA(2010)0304)*, see para 9.

¹²¹ J Lew, “Achieving the Dream: Autonomous Arbitration.” (2006) 22 *Arbitration International* 179.

relationship between court proceedings and arbitral proceedings could be seen as an unwelcome interference with Member States' legislative space that is demonstrably diverse on the issue of parallel proceedings between courts and arbitration, and which seeks to influence international arbitration beyond the EU. The European Parliament found that forcing a harmonised solution on Member States, where Member States have not reached a common position on the matter, could prove to be counter-effective.¹²² Instead, notable changes were introduced to the recitals limiting the scope of Brussels I in situations concerning arbitration. Furthermore, no changes were made to Article 1(2)(d) of Brussels I.

2. *West Tankers conforms to the CJEU's earlier jurisprudence*

AG Wathelet in *Gazprom* attacked the reasoning in *West Tankers* based on two key submissions. Firstly, that recital 12 of the recast Brussels I has the effect of excluding from the scope of Brussels I, court proceedings in which the validity of the arbitration agreement was contested.¹²³ AG Wathelet relied on the language of recital 12 (2) which states that:

A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.

¹²² European Parliament Resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *supra* n 121, para L.

¹²³ Opinion of Advocate General Wathelet in Case C-536/13 *Gazprom*, EU:C:2014:2414, para 125.

In his view, the non-italicised passage above removes proceedings concerning the validity of the arbitration agreement, even as an incidental matter, from the scope of the recast Brussels I. In such a way, an anti-suit injunction issued by a court of a Member State ordering parties to stop proceedings before a court of another Member State would not be seen as contrary to the principle of effectiveness of EU law.¹²⁴

Secondly, that *West Tankers*' reasoning was wrong and did not comply with previous CJEU decisions, namely *Hoffmann*¹²⁵ and *Rich*.¹²⁶ *Hoffmann* concerned the enforcement of a German judgment before a Dutch court ordering a husband to pay monthly maintenance payments to his wife. The husband claimed that the German judgment was irreconcilable with an earlier Dutch judgment which had dissolved the marriage, a matter which fell outside the scope of Brussels I.¹²⁷ In a preliminary reference to the CJEU it was asked, *inter alia*, to:

establish whether a foreign judgment whose enforcement has been ordered in a Contracting State pursuant to Article 31 of the Convention must continue to be enforced in all cases in which it would still be enforceable in the State in which it was given even when, under the law of the State in which enforcement is sought, the judgment ceases to be enforceable for reasons which lie outside the scope of the Convention.¹²⁸

As stated above, the judgment ceased to be enforceable in the Netherlands because the marriage had been dissolved by a judgment of the Dutch court in a dispute between the same parties.¹²⁹ The CJEU held that the Dutch court seised with the request of recognition and enforcement was entitled under Article 27(3) of the Brussels Convention to take into account the divorce

¹²⁴ See *ibid*, para 127.

¹²⁵ Case 145/86, EU:C:1988:61.

¹²⁶ *Supra* n 32.

¹²⁷ Art 1.

¹²⁸ *Supra* n 125, para 12.

¹²⁹ *Ibid*, para 24.

decree, which had undermined the presupposed marriage relationship between the husband and wife, and accordingly, to refuse recognition and enforcement.¹³⁰ This was possible because the Convention judgment was deemed to be in conflict with a national rule concerning the status of a natural person.¹³¹ Equally the court found that under Article 27(4) of the Convention the seised court could refuse recognition and enforcement of a Convention judgment which was irreconcilable with a national judgment. The CJEU stated that:

the judgments at issue have legal consequences which are mutually exclusive. The foreign judgment, which necessarily presupposes the existence of the matrimonial relationship, would have to be enforced although that relationship has been dissolved by a judgment given in a dispute between the same parties in the state in which enforcement is sought.¹³²

The AG reasoned that in the judgment of *West Tankers*:

although arbitration, like the status of natural persons, was excluded from the scope of the Brussels I Regulation, the Court held that the English courts could not apply their national law to its full extent and issue anti-suit injunctions in support of an arbitration. In doing so, the Court restricted the extent to which arbitration is excluded from the scope of that regulation.¹³³

It is argued here that the decision in *West Tankers* can be distinguished from the *Hoffmann* decision in fact and in law. The main proceedings in *Hoffmann* were triggered as a result of irreconcilability between a national judgment and a Regulation judgment before the same national court. The effectiveness of the Brussels Regulation therefore was not constrained in

¹³⁰ *Ibid*, para 25.

¹³¹ *Ibid*, paras 16-18.

¹³² *Ibid*, para 24.

¹³³ *Supra* n 123, para 103.

anyway because the solution to the irreconcilability, unlike the anti-suit injunction in *West Tankers*, was founded on the application of Brussels I, i.e. Brussels I was applicable under the old articles 27(3) and 27(4) and formed an important part of the court's reasoning.

In relation to *Rich*, AG Wathelet contended that *Rich* demands that the scope of Brussels I be assessed in relation to the subject matter of the dispute in the main proceedings.¹³⁴ AG Wathelet then went on to say that the court in *West Tankers* instead of examining the subject-matter of the dispute in the main proceedings, examined it in the light of another dispute, namely the dispute brought before the Italian courts and by that departed from its approach in *Rich*.¹³⁵

The above assessment of *Rich* does not pay close attention to the main question which was put before the CJEU. In *Rich* the claimant brought proceedings before the London High Court requesting the court to appoint an arbitrator in accordance with the English Arbitration Act. The respondent challenged the validity of the arbitration agreement as a preliminary matter before that court. Therefore, in *Rich* the emphasis was on the treatment of a preliminary issue concerning the validity of the arbitration agreement in London court proceedings principally concerned with the appointment of an arbitrator. *Rich* reasoned that when assessing the scope of the Brussels Convention reference should be made solely to the subject-matter of the dispute.¹³⁶

In *West Tankers* the subject matter in the main proceedings before the Italian court was brought in tort, namely whether the ship owner was liable to pay damages to the subrogated

¹³⁴ *Ibid*, para 110. See also *Van Uden Maritime v. Deco-Line*, *supra* n 33, that concerned the relationship between Arts 1(2)(d) and 31 of Brussels I regarding provisional measures. Relying on the reasoning in *Marc Rich* the Court decided that Art 24 may confer jurisdiction on the court hearing that application for a provisional measure despite that proceedings commenced on the substance of the case in arbitration (para 34 of the decision).

¹³⁵ *Ibid*, paras 111-112.

¹³⁶ P Stone, *EU Private International Law* (Elgar European Law Series, 2014) 29.

insurer as a result of their tortious conduct which had occurred in Italy. Article 1(2)(d) on the other hand "extends to judicial proceedings whose principal subject matter is arbitration... regardless of any preliminary issue involved in the proceedings."¹³⁷ Therefore, in *West Tankers* the Italian proceedings fell within the scope of the Regulation. This was the primary reason which triggered the application of the principle of effectiveness, regardless of whether or not the London proceedings fell outside the scope of the Regulation. Therefore, there was nothing in the *West Tankers*' reasoning that departed from the approach in *Rich*. *West Tankers* simply developed the decision in *Rich* taking into account the proceedings before the Italian courts.

3. No express repeal of *West Tankers* in Recital 12

It is important to emphasise that the CJEU in *Gazprom* neither supported nor rejected AG Wathelet's opinion that the recast Brussels I has challenged the reasoning of *West Tankers*.¹³⁸

Contrary to the submission of AG Wathelet in *Gazprom*, the recast Brussels I does not alter the reasoning in *West Tankers*. Recital 12 reiterates that Brussels I 'should not' apply to arbitration. However, it clarifies that proceedings such as those which were brought before the Italian court in *West Tankers* are not removed from the scope of Brussels I by virtue of the exclusion of arbitration, namely, that nothing prevents:

courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the

¹³⁷ *Ibid*, 36.

¹³⁸ See J Sundaram, "Does the Judgment of the CJEU in *Gazprom* Bring About Clarity on the Grant of Anti-Suit Injunctions Under the Brussels I Regulation?" (2015) 27 *Denning Law Journal*, 303-322, 320.

arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.¹³⁹

Given that no amendments have been made to Article 1(2)(d) of the original text of Brussels I and particularly because the Council of the EU rejected the proposed amendments by the Commission which would have brought arbitration partially into the scope of Brussels I by giving priority to the seat of arbitration, there is considerable evidence to suggest that the reasoning in *West Tankers* has survived the reforms made in the recast Brussels I.¹⁴⁰ However, it will be shown in E4 and 5 that important obstacles which had stood in the way of the protection of international commercial arbitration have now been removed by the recast Brussels I.

4. Recital 12(2) does not have the effect of reversing the *West Tankers* decision

Perhaps the most explicit change to Brussels I brought about by recital 12 of Brussels I recast relates to the enforceability of a judgment determining the validity of an arbitration agreement.

Recital 12 states that:

A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation,

¹³⁹ Recital 12 of the Recast Brussels I Regulation, *supra* n 1.

¹⁴⁰ G Carducci, “Validity of Arbitration Agreements, Court Referral to Arbitration and FAA § 206, Comity, Anti-Suit Injunctions Worldwide and Their Effects In The E.U. Before and After the New E.U. Regulation 1215/2012” (2013) 24 *American Review of International Arbitration* 515, 543.

regardless of whether the court decided on this as a principal issue or as an incidental question.¹⁴¹

AG Wathelet contended that the effect of Recital 12(2) was to remove proceedings concerning the validity of the arbitration agreement from the scope of Brussels I, and by doing so it allowed a court of a Member State to issue an anti-suit injunction ordering a party to stop proceedings before another court of a Member State. The authors submit here that recital 12 does not have such an effect with regards to anti-suit injunctions issued by a Member State court.¹⁴²

The reader should be reminded that recitals do not have the status of law under EU law.¹⁴³ They do however provide an interpretive aid for the CJEU to understand the legislative intention behind the legal provision. Recital 12 firmly stipulates that Member States are not obliged to recognise or enforce judgments by courts of other Member States which determine the validity of an arbitration agreement. The reader should also pay attention to the historical context of recital 12(2), which was introduced in order to address the type of situation in *National Navigation v Endesa (Wadi Sudr)*. The central issue in *Wadi Sudr* was whether a decision by a Spanish court that an arbitration agreement was not binding on the parties, and which was not a judgment on the merits, should be treated as a Regulation judgment, and therefore enjoy the enforcement provisions of Brussels I.¹⁴⁴ A decision in the affirmative would have brought to an end the arbitral proceedings in London. The Court of Appeal in *Wadi Sudr*,

¹⁴¹ *Supra* n 1.

¹⁴² See also Ojiegbe, *supra* n 7. See also Storskrubb, *supra* n 7, 588.

¹⁴³ Recitals in EU legislation are used to determine the intent of the legislator in the main provisions. See Case C-162/97 criminal proceedings against Gunnar Nilsson, Per Olov Hagelgren, Solweig Arrborn [1998] ECR: I-07477, para 54. Reference for a preliminary ruling: Helsingborgs tingsrätt – Sweden. See also T Klimas and J Vaičiukaitė, “The Law of Recitals in European Community Legislation,” (2008) 15 *ILSA Journal of International and Comparative Law* 15-16.

¹⁴⁴ *National Navigation Co v Endesa Generacion SA*, [2009] EWCA Civ 1397, para 32.

relying on the decision of the CJEU in *West Tankers*, ruled that since the main proceedings in Spain concerned a matter that fell within the scope of the Regulation, a judgment on the applicability of the arbitration agreement in the same proceedings should be treated as a Regulation judgment.¹⁴⁵

An important practical effect of recital 12(2) is that arbitral proceedings that have commenced could continue despite the validity of the arbitration agreement being scrutinised by a national court. This brings Brussels I into conformity with acceptable international practice as outlined by Article 8 (ii) of the UNCITRAL Model Law.¹⁴⁶ According to this Article, the party relying on the arbitration agreement can proceed with the arbitration, in the knowledge that any adverse decision on the validity of the arbitration agreement by a court of a Member State delivered in the parallel proceedings will not enjoy the enforcement regime of Brussels I.

As a matter of practice parties who resist the parallel court proceedings are often advised by their legal advisors to commence arbitral proceedings at the seat of arbitration. Despite the risk of increasing costs, the consolation is that more often than not the arbitral proceedings will conclude long before the court litigation does. Moreover, the choice of an experienced seat of arbitration should be in principle supportive of the arbitration agreement. This decision can then have greater force if the objection to the jurisdiction of the tribunal is heard firstly by the arbitral tribunal, or alternatively by a court at the seat of arbitration. The latter is usually more procedurally efficient than the court dealing with the validity of the

¹⁴⁵ *Ibid* para 40. For a critique of this case and an analysis of its relevance to the Brussels I arbitration exclusion see P Beaumont and E Johnston, “Can *exequatur* be abolished in Brussels I whilst retaining a public policy defence?” (2010) 6 *Journal of Private International Law* 249, 266-270.

¹⁴⁶ Art 8 (2) of the UNCITRAL Model Law on International Commercial Arbitration [2006 consolidated version].

arbitration agreement as an incidental matter to the main proceedings, (as evidenced in the Italian proceedings in *West Tankers*).

5 The irreconcilability between an award and a judgment

The discussion above shows that Brussels I does not contain a specific solution to parallel proceedings between court litigation and arbitration in its text. The problem is that a court of a Member State may decide that the arbitration agreement is invalid and proceed to make a decision on the merits, which is within its right under Article II of the New York Convention.¹⁴⁷ In the meantime a tribunal may continue with the parallel proceedings and deliver a conflicting award on the same subject matter. Therefore, there is a possibility, at least in theory, that an irreconcilability between an arbitral award and a court judgment could occur, which would bring a host of problems at the time of recognition and enforcement of the Regulation judgment and the arbitral award. That, for obvious reasons, has the potential to diminish the value of the judgment as well as the value of the arbitral award. Neither the original Brussels I Regulation, nor the New York Convention, contains a solution to this problem in its text.

There are a number of possible answers to this conundrum. It is possible to argue that the national court will favour the arbitral award and engage the public policy exception in Brussels I, which stipulates that a Member State shall refuse recognition of a Regulation judgment “if such recognition is manifestly contrary to the public policy in the Member State addressed.”¹⁴⁸ This is made more compelling when viewed from the prism of the principle of *res judicata*, which in relation to an arbitral award delivered before a Regulation judgment may

¹⁴⁷ Art II of the New York Convention, *supra* n 3.

¹⁴⁸ See Art 45(I)(a) of the Recast Brussels I, *supra* n 1.

create an issue of preclusion before the national court during the recognition proceedings of the Regulation judgment.¹⁴⁹

Having said that it is difficult to see how the public policy exception could operate in the context of irreconcilability between a Regulation judgment and an arbitral award. Firstly, Articles 45(1)(a) and 46 of Brussels I which allow for derogation from the enforcement system under Brussels I have been applied restrictively. The CJEU stressed that the public policy exception ‘should operate only in exceptional circumstances, and the limits of the concept are a matter for interpretation of the Regulation, to be determined by the European Court’.¹⁵⁰ For example, the English Court of Appeal in the *Wadi Sudr*, discussed above, refused to apply the public policy exception to a Spanish judgment which determined that the arbitration agreement was not incorporated in the contract, despite being contrary to the English law position on the matter.¹⁵¹ Moore-Bick LJ stated in the *Wadi Sudr*:

In my view, however much importance is attached to arbitration, or even to the principle that contracts are to be performed, it cannot be said that the failure on the part of the Spanish court in good faith to give effect in this case to an arbitration agreement imperfectly spelled out in the bill of lading (but in the eyes of English law sufficiently incorporated by reference) would involve a manifest breach of a rule of law regarded as essential in the legal order of the United Kingdom or of a right recognised as being fundamental within that legal order.¹⁵²

¹⁴⁹ L Di Brozolo, “*Res judicata* in Post Award Issues” (2011) *ASA Special Series* No. 38 (P. Tercier, ed.), 127, 131.

¹⁵⁰ See Stone, *EU Private International Law*, *supra* n 137, 235. See also Case C-116/02 *Krombach v Bamberski* [2000] ECR I-1935, para 20.

¹⁵¹ See *National Navigation*, *supra* n 144, para 65 and paras 124-133.

¹⁵² See *ibid*, para 131. Beaumont and Johnston, *supra* n 145, 269, found Moore-Bick’s reasoning persuasive in this case because the Spanish court “had indeed acted in ‘good faith’ in deciding that the arbitration agreement had not been incorporated into the bill of lading” but were pleased that Moore-Bick’s reasoning does not preclude the “English courts from using

Secondly, when considering the main role of the doctrine of *res judicata* we begin to see why it is unlikely to trigger the operation of the public policy exception. The principle of *res judicata* is often used in order to prevent the relitigation of the same cause of action between the same parties, primarily before the court, and the arbitral tribunal. It is uncommon for it to be used in the context of irreconcilability between an arbitral award and a court judgment.¹⁵³ Moreover, the operation of the doctrine itself is highly dependent on domestic law, which makes it less conducive to uniformity and certainty. It is difficult to ascertain who is bound by the *res judicata* effect of an arbitral award and when the award becomes *res judicata*, and whether it depends on it being enforced.¹⁵⁴

As seen in the analysis above the public policy exception found under Articles 45 and 46 does not offer a convincing answer to the problem of irreconcilability of an arbitral award and a Regulation judgment. Going back to the illustration in the introduction, the French court, faced with such irreconcilability would have to have come up with an answer; either to enforce the arbitral award or to enforce the Regulation judgment. In the forthcoming analysis it is submitted that the recast Brussels I contains a solution to this problem under Article 73(2).

(a) *The Recast Brussels I offers a solution*

Recital 12(3) of the Regulation stipulates that where a court of a Member State considers an arbitration agreement to be void, voidable, inoperative or incapable of being performed and delivers a judgment on the merits, that judgment could continue to enjoy the enforcement provisions of Brussels I, save where this prejudices a court of a Member State from enforcing an arbitral award under the New York Convention.¹⁵⁵ The only possible situation where the

public policy as a basis for refusing to recognise a judgment that is clearly in violation of the New York Convention.”

¹⁵³ For a general discussion of the doctrine of *res judicata* in the context of international arbitration see L Di Brozolo, *supra* n 149.

¹⁵⁴ *Ibid.*

¹⁵⁵ Recital 12(3) of the Recast Brussels I Regulation, *supra* n 1.

second part of this recital 12(3) will be of relevance is where the arbitral award creates a material conflict with the Regulation judgment. Recital 12 envisages, therefore, a situation where the enforcement of a Regulation judgment will compromise the effectiveness of the enforcement regime of New York Convention 1958. Recital 12 does not establish a precedence of the arbitral award over the conflicting Regulation judgment.¹⁵⁶ Instead recital 12 gives the green light to a court of a Member State to favour the arbitral award without risking being in breach of the principle of effectiveness of EU law.

The recast Regulation includes a solution in its text under Article 73(2) which stipulates that the Regulation ‘shall not affect’ the application of the New York Convention. This could only be understood as meaning that the Member State has no discretion whether or not to enforce the arbitral award under the Regulation, other than on grounds allowed under the New York Convention. Therefore Article 73(2) demands that the enforcement regime of the New York Convention be applied first.¹⁵⁷

There are two reasons that make the above interpretation correct. The first is based on a literal interpretation of Article 73(2) which, unlike its predecessor under Brussels I [Art. 71(1)], makes an express reference to the New York Convention¹⁵⁸. It states that “This Regulation shall not affect the application of the 1958 New York Convention” [bold added]. A Member State that prefers the Brussels I judgment over a conflicting arbitral award such as in

¹⁵⁶ Leandro, *supra* n 90, 191-192. However, see P Beaumont and L Walker, “Recognition and enforcement of judgments in civil and commercial matters in the Brussels I Recast and some lessons from it and the recent Hague Conventions for the Hague Judgments Project” (2015) 11 *Journal of Private International Law* 31, 39 who assert that: “in the event of a clash between the recognition and enforcement of a valid judgment from a Member State and a valid arbitration award under the New York Convention the latter should prevail (see Recital 12, para 3 last sentence, and Article 73(2)).”

¹⁵⁷ See Art 73(2) and Recital 12 of Brussels I Recast, *supra* n 1.

¹⁵⁸ The CJEU ruled in *Gazprom* that Article 71 of Brussels I governs ‘only the relations between that regulation and conventions falling under the particular matters that come within the scope of Regulation No 44/2001’. Accordingly, given that the New York Convention governs matters excluded from the scope of Brussels I, it therefore does not relate to ‘particular matters’ as envisaged under Article 71(1). See *Gazprom*, *supra* n 5, para 43.

the example we make above will no doubt ‘affect’ the application of the New York Convention. Therefore, we conclude that Article 73(2) demands that the enforcement regime of the New York Convention be applied first. In a way this proposed application of Article 73(2) has a similar effect to the principle of effectiveness discussed above in D, and supported by the rationale of recital 12 (3). However, on this occasion it is EU law that has to give heed to the New York Convention. It is important to emphasise that it is not a question of primacy of the New York Convention over Brussels I so much as it is about giving effect to the New York Convention.

The second reason is based on a teleological interpretation. It is important to be reminded that according to settled case-law when:

interpreting a provision of European Union law it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part.¹⁵⁹

Therefore in addition to the wording of Article 73(2) account should be given to its objective, the context in which it occurs, and the objectives pursued by the recast Brussels I.¹⁶⁰ In order to discover the objectives of Article 73(2) regard must be given to recital 12(3), which clearly preserves the New York Convention enforcement regime vis-a-vis Brussels I. For the first time in the history of Brussels I there is a clear reference to the precedence of the New York Convention. It is not far-fetched then to argue that one of the objectives of Article 73(2) is to consolidate the precedence of the New York Convention envisaged in the recitals and make sure that the enforcement regime of the New York Convention is preserved. Furthermore, the Heidelberg report, which preceded the reforms of Brussels I, demonstrated that there is not

¹⁵⁹ Case C-301/98 *KVS International* [2000] ECR I-3583, para 21.

¹⁶⁰ C-533/08 *TNT Express Nederland BV v Axa Versicherung AG* [2010] ECR I-04107, para 44.

much appetite among Member States to accept a situation where the effectiveness of the New York Convention is undermined by Brussels I or any other regional treaty for that matter.¹⁶¹

This is also a pragmatic solution for the issue at hand. The above analysis would have the effect of suspending the decision on whether or not to enforce the Regulation judgment. At the same time it is perfectly plausible that a court seised with the request of recognition and enforcement, would refuse recognition and enforcement of the arbitral award under any of the available grounds of challenge to recognition and enforcement found in Article V of the New York Convention; for example, by finding that the arbitration agreement is void, or because enforcement of the arbitral award contravenes public policy.¹⁶² This is also a rational conclusion because a decision to enforce the arbitral award means that the original court, which was seised on the subject matter, most likely did so by ignoring a valid arbitration agreement, or by erroneously deciding that the agreement was invalid. It is pertinent to point out that such a wrong assertion of jurisdiction may be considered in some Member States as being in breach of public policy, and therefore would be refused recognition and enforcement under Brussels I.¹⁶³

We should also accept the above analysis based on policy considerations. Firstly, this solution will mitigate the inefficiencies resulting from *West Tankers* by providing a disincentive to disputants to pursue a court action in breach of an arbitration agreement. Secondly, the above proposed interpretation of Article 73(2) could preserve the integrity of the Regulation judgment, where the court finds that one of the grounds in Article V of the New York Convention is satisfied.¹⁶⁴ The authors acknowledge that giving such an application to

¹⁶¹ B Hess, T Pfeiffer and P Schlosser, *Report on the Application of Regulation Brussels I in the Member States* (Study JLS/C4/2005/03) [Heidelberg], para 116.

¹⁶² Arts V(1)(ii) and V(2)(I) of the New York Convention respectively.

¹⁶³ Heidelberg, *supra* n 161, para 119.

¹⁶⁴ Article V of the New York Convention contains grounds that a losing party could rely on in order to challenge recognition and enforcement of the arbitral award.

Article 73(2) may weaken the free movement of judgments among Member States. It may further be the case that the principle of mutual trust which is so important to the system of Brussels I is *prima facie* compromised. In defence however it is submitted that since the given solution resides in Brussels I, this challenge to the above principles should be accepted when considering how important it is to the EU and Member States to preserve the integrity and uniformity of the New York Convention.

Finally, the above analysis should apply to any conflict between the enforcement of an arbitral award under New York Convention and Brussels I. It should extend to a conflict between an arbitral award and part II of Brussels I which covers jurisdiction rules. Therefore where a court of a Member State is seised with a request, say for example, the enforcement of an award containing a monetary relief resulting from a breach of the arbitration agreement, this should not be in conflict with the principle of effectiveness of EU law if by doing so it indirectly affects the jurisdiction of a court of another Member State which has seised jurisdiction under Brussels I. There is a general consensus in favour of relaxing the application of the principle of effectiveness where an interface occurs between arbitration and Brussels I, and this reading of the situation allows further movement in that direction.

Whether we accept or reject the analysis above it is important to recognise that a more explicit solution to the problem of irreconcilability between a judgment and an arbitral award should be placed high on the EU Commission's agenda during the next round of reform of the Brussels I.

F. Conclusion

This article demonstrates that the system of Brussels I does not offer an express solution in its text that prevents the occurrence of parallel proceedings. Furthermore, this article casts serious doubt about the submissions made by AG Wathelet in the *Gazprom* case attacking the conformity of *West Tankers* with earlier jurisprudence of the CJEU. It also demonstrates that *West Tankers* reasoning is very likely to survive despite the changes brought about by recital 12 of the recast Brussels I.

However, it is shown that the competing policies; those prevailing in the system of international commercial arbitration on the one hand, and those supporting the system of Brussels I on the other hand, have now been brought into greater harmony under the recast Brussels I. It was made clear that there have been notable reforms to the system of Brussels I that assist in organising the interface between arbitration and Brussels I, in a way which pushes forward the interests of international commercial arbitration. For example, by removing the enforcement of a judgment on the validity of the arbitral award from the enforcement regime of Brussels I, or by favouring the New York Convention enforcement regime over Brussels I in a situation of irreconcilability between an arbitral award and a Regulation judgment; or by limiting the obligation to respect the principle of mutual trust to courts of Member States as opposed to arbitral tribunals such as in the case of *Gazprom*; or by upholding a decision of an arbitral body to the effect that the party taking parallel court action is in breach of the arbitration agreement, and (in cases of irreconcilability between the arbitral award and a parallel court award), giving primacy to the arbitral award and enabling a national court to enforce such an order.

Whilst this does not bring to an end abusive parallel proceedings, the recast Brussels I (by its revisions to the original Brussels I), and *Gazprom* (by its interpretation of key non-revised parts of Brussels I), *do* certainly provide more support for international commercial arbitration by giving more scope to national courts to restrict parallel proceedings. As a result,

there are now further disincentives to the use of parallel proceedings. This should also help to consolidate the EU's commitment to preserving the integrity of the New York Convention regime.